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Paper No. 8

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MAY 02 2003

OFFICE OF PETITIONS

In re Application of	:
Jung Sheng Ku	:DECISION ON PETITION
Application No. 09/863,916	:UNDER 37 CFR 1.137(a)
Filed: May 21, 2001	:
For: FUSE HOLDING AND SECURING	:
ASSEMBLY	:

This is a decision on the petition under 37 CFR 1.137(a), filed July 3, 2002 and supplemented by facsimile transmission on October 11, 2002, to revive the above-identified application.¹

The petition is dismissed.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to timely reply to the nonfinal Office action mailed November 5, 2001, which set a three month shortened statutory period within which to file a reply. No response having been received or extensions of time pursuant to the provisions of 37 CFR 1.137(a) having been received, this application became abandoned on February 6, 2002.

Petitioner herein, Jung Sheng Ku, states that a reply to the November 5, 2001 Office action was in fact sent by facsimile transmission. In support of this statement, petitioner has supplied a copy of the previously transmitted "Amendment and Reply" which bears a certificate of facsimile transmission date of February 4, 2002. In further support of the alleged timely submission of the reply, petitioner, on October 11, 2002,

¹ The Office sincerely apologizes for the delay in replying to the instant petition and any inconvenience caused petitioner by this delay.

supplied a copy a sending unit's report, and states that "[t]he amendment transmitted to FAX: (703) 3087722 on 04 February 2002 was actually transmitted after late night of 04 February 2002, or on 00:06:07am early in the morning of 05 February 2002."

37 CFR 1.8(b) states:

(b) In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the Patent and Trademark Office, and the application is held to be abandoned or the proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

(1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;

(2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and

(3) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous timely mailing or transmission. **If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement.**

(c) The Office may require additional evidence to determine if the correspondence was timely filed.

The petition herein fails to comply with the provisions of 37 CFR 1.8(b)(3) in that the sending unit's report does not confirm the actual date of the transmission of the reply asserted by petitioner to have been sent on February 4, 2002 or February 5, 2002.

In reviewing the sending unit's report, it is noted that item 5, which is underlined and marked with a check mark, presumably to indicate the item which is the subject of this petition, has the

following notation: "91/02/05 U.S.A. 180338087722 02 00:06:07 00:09:27 34 8.84." This transmission report is ineffective to substantiate the date on which the reply was actually transmitted, since the date of transmission on the report is February 5, 1991. Additionally, it appears that the number of pages transmitted was 34, while the copy of the reply submitted with the petition contains only 7 pages. Additionally, it appears that petitioner, himself, is unclear as to the exact date of transmission in view of his statement that the reply was "actually transmitted after late night of 04 February 2002, or on 00:06:07am early in the morning of 05 February 2002."

The Commissioner may revive an application which became abandoned for failure to prosecute if it is shown to the satisfaction of the Commissioner that such delay was unavoidable. The burden of showing the cause of unavoidable delay is on the person seeking to revive the application. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the

delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, *supra*. Petitioner herein has failed to provide any direct evidence proving exactly on what date the reply asserted to have been transmitted by facsimile was actually sent to the United States Patent and Trademark Office (USPTO). In this regard, the sending unit's report fails to adequately link the reply with either February 4 or 5, 2002 or to properly indicate the number of pages transmitted. A "reasonably prudent person" would file papers in compliance with 37 CFR 1.8 to ensure their timely filing in the USPTO, **as well as preserve adequate evidence of such filing**. As noted above, the burden of showing that the cause of the delay is on the person seeking to revive the application. Smith v. Mossinghoff, *supra*. Accordingly, the record fails to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 USC 133 or 37 CFR 1.137(a).

If petitioner cannot provide the evidence necessary to establish unavoidable delay, petitioner may wish to consider filing a petition under 37 CFR 1.137(b) stating that "the entire delay in filing a timely reply to the date of the filing of a grantable petition under 37 CFR 1.137(b) was unintentional." A form for filing a petition under the unintentional provisions of 37 CFR 1.137(b) is enclosed for petitioner's convenience. The fee for reviving under the unintentional provisions of 37 CFR 1.137(b) is currently \$650. It is noted that a \$10 excess fee was submitted with the petition under 37 CFR 1.137(a). Accordingly, if petitioner herein seeks revival under the unintentional provisions of 37 CFR 1.137(b), a balance due of \$640 should be submitted with the petition to revive.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITION
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

By hand: Crystal Plaza Four, Suite 3C23
2201 South Clark Place
Arlington, VA 22202

By Fax: (703) 308-6916
ATTN: Office of Petitions

Any questions concerning this matter may be directed to the undersigned at (703) 305-8680.



Frances Hicks
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

ATTACHMENT: Petition to Revive Form under 37 CFR 1.137(b)